Supreme Court, U. S.
FILED
SEP 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-217

RENO-WEST COAST DISTRIBUTING CO., INC.,
Petitioner,

v.

THE MEAD CORPORATION, BLAKE, MOFFIT & TOWNE, a division of SAXON INDUSTRIES, INC., NOLEX, INC., NOLAND PAPER COMPANY and SEABOARD PAPER COMPANY,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

Armistead W. Gilliam, Jr.
Charles J. Faruki
SMITH & SCHNACKE
2000 Courthouse Plaza, N.E.
P. O. Box 1817
Dayton, Ohio 45401
(513) 226-6734

Attorneys for Respondents
The Mead Corporation, Nolex, Inc., Noland Paper Company and Seaboard Paper Company

Of Counsel:

Robert L. Maines
Charles B. Klinedinst
PETTIT, EVERS & MARTIN
600 Montgomery Street
Transamerica Building
21st floor
San Francisco, California 94111
(415) 434-4000

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES iii

QUESTIONS PRESENTED 1

REASONS FOR DENYING THE WRIT 3

STATEMENT OF THE CASE 5

ARGUMENT

A. ISSUES ONE AND TWO: THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE PLAINTIFF'S PROPOSED INSTRUCTION NO. 5 AS IT EMBODIED THE LAW SET FORTH IN *GTE SYLVANIA* AND IN *UNITED STATES v. GENERAL MOTORS CORP.* 12

1. The Trial Court Properly Refused Plaintiff's Proposed Instruction No. 5 As An Incorrect Statement Of The Law Under *GTE Sylvania.* 12

2. The District Court Properly Refused Plaintiff's Proposed Instruction No. 5 Insofar As That Proposed Instruction Relied Upon *United States* v. *General Motors Corp.* 19

B. ISSUE THREE: THE NINTH CIRCUIT DID NOT ERR IN HOLDING THAT THE DISTRICT COURT PROPERLY TRIED THIS ACTION UNDER THE EN BANC NINTH CIRCUIT OPINION IN *GTE SYLVANIA,* WHICH EN BANC

page

OPINION WAS DELIVERED OVER FIVE MONTHS BEFORE THE TRIAL OF THIS ACTION IN SEPTEMBER-OCTOBER 1976. 23

C. ISSUE FOUR: THE DISTRICT COURT DID NOT ERR IN REFUSING TO ALLOW PETITIONER'S PRESIDENT TO TESTIFY AS AN EXPERT, WHEN THE DISTRICT COURT DID PERMIT (1) PETITIONER'S PRESIDENT TO TESTIFY AS A LAYMAN BOTH AS TO THE THEORY AND NUMBERS INVOLVED IN THE ALLEGED DAMAGES, AND (2) A Ph.D. FROM THE UNIVERSITY OF MICHIGAN TO TESTIFY AS AN EXPERT CONCERNING BOTH THE THEORY AND NUMBERS INVOLVED IN THE ALLEGED DAMAGES. 28

CONCLUSION 32

TABLE OF AUTHORITIES

Cases: page

Adolph Coors Co. v. *A&S Wholesalers, Inc.*, 561 F. 2d 807 (10th Cir. 1977) 26

Arkwright Mutual Insurance Co. v. *Philadelphia Electric Co.*, 427 F.2d 1273 (3d Cir. 1970) 13

Bradley v. *School Board of City of Richmond*, 416 U.S. 696 (1974) 2, 24

Chavis v. *Finnlines Ltd.*, 576 F.2d 1072 (4th Cir. (1978) 13

Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) 2

Cort v. *Ash*, 422 U.S. 66 (1975) 2, 24

Coughlin v. *Capitol Cement Co.*, 571 F.2d 290 (5th Cir. 1978) 12

Coursey v. *Morgan Driveway, Inc.*, 366 F.2d 504 (6th Cir. 1966) 13

Eastern Scientific Co. v. *Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883 (1st Cir. 1978) 24-25

Florida Harvestore, Inc. v. *A. O. Smith Harvestore Products, Inc.*, 1977-2 CCH Trade Cases ¶ 61,679 (5th Cir. 1977) 25

General Beverage Sales Co. v. *East-Side Winery*, 568 F.2d 1147 (7th Cir. 1978) 25

GTE Sylvania Inc. v. *Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976) 22, 24

Gray v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1972) 12

page

Hamling v. *United States*, 418 U.S. 87 (1974) 3, 13, 21, 29

Investment Service Co. v. *Allied Equities Corp.*, 519 F.2d 508 (9th Cir. 1975) 13

Jeter v. *St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975) 13

Marquis v. *Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978) 13, 30

McGrath v. *Wallace Murray Corp.*, 496 F.2d 299 (10th Cir. 1974) 13

National Auto Brokers Corp. v. *General Motors Corp.*, 572 F.2d 953 (2d Cir. 1978) 25

Pacific Coast Agricultural Export Association v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976) 30

Palmer v. *Hoffman*, 318 U.S. 109 (1943) 12

Pinkus v. *United States*, 436 U.S. 293 (1978) 12, 16

Salem v. *United States Lines Co.*, 370 U.S. 31 (1962) 3, 29

Shaw v. *Lauritzen*, 428 F.2d 247 (3d Cir. 1970) .. 12

Southern Ry. Co. v. *Jones*, 228 F.2d 203 (6th Cir. 1955) 12

Thorpe v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969) 24

United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) 1, 18, 19

page

United States v. *General Motors Corp.*, 384 U.S. 127 (1966) 2, 4, 19, 20, 21

United States v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) 12

United States v. *McCarty*, 440 F.2d 681 (6th Cir. 1971) 13

United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) 2, 22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-217

RENO-WEST COAST DISTRIBUTING CO., INC.,

Petitioner,

v.

THE MEAD CORPORATION, BLAKE, MOFFIT & TOWNE, a division of SAXON INDUSTRIES, INC., NOLEX, INC., NOLAND PAPER COMPANY and SEABOARD PAPER COMPANY,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

QUESTIONS PRESENTED

Petitioner's statement of the questions presented[1] is misleading and frames issues not presented in their present form to the courts below. The following questions are presented to this Court, each of which this Court has answered in various prior decisions. The questions presented below are in the same order as those set forth in the four questions presented at p. 4-5 of the Petition.

1. Did the District Court err in refusing to give the *Schwinn*[2] per se instruction (Plaintiff's Proposed Instruc-

---

[1] Petition at pp. 4-5.

[2] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

tion No. 5) requested by Petitioner, which was the only per se jury instruction Petitioner sought at trial?

This question was answered in the negative in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*").

2. Did the District Court err in refusing to give Plaintiff's Proposed Instruction No. 5, as that proposed jury charge purports to follow *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966)?

This question was answered in the negative in *GTE Sylvania, United States* v. *General Motors Corp.*, and *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972).

3. Did the District Court err in following the Ninth Circuit's previous opinion in its en banc consideration of *GTE Sylvania* which en banc opinion of the Ninth Circuit was later affirmed by this Court in *GTE Sylvania,* when (1) the Ninth Circuit's en banc opinion was decided April 9, 1976, and (2) when this case was tried in September and October, 1976?

This question was answered in the negative by this Court in *GTE Sylvania,* and by this Court's repeated holdings that a court (in this case the Ninth Circuit) should apply the law in effect at the time it renders its decision, *Bradley* v. *School Board of City of Richmond,* 416 U.S. 696, 711 (1974); and *Cort* v. *Ash,* 422 U.S. 66, 76-77 (1975).

4. Did the District Court err in refusing to allow Petitioner's president to testify *as an expert* concerning Petitioner's alleged damages, in view of the fact that the District Court (1) permitted Petitioner's president to testify as a layman both as to the theory and numbers involved in the alleged damages, and (2) permitted a Ph.D. from the University of Michigan to testify as an expert concerning both the theory and numbers involved in the alleged damages?

This question was answered in the negative in *Hamling* v. *United States,* 418 U.S. 87, 108 (1974); and in *Salem* v. *United States Lines Co.,* 370 U.S. 31, 35 (1962).

REASONS FOR DENYING THE WRIT

Respondents agree with Petitioner's statement that there are "stringent rules" for determination of the grant of petitions for certiorari.[3] The instant Petition must fail because no novel or significant questions are presented for review. There are at least four separate reasons for denying this Petition, each of which is sufficient:

(1) There is no "extension of this Court's *GTE-Sylvania* rule of reasons [sic] test to vertical price restraints"[4] as claimed by Petitioner. Contrary to Petitioner's claims,[5] the trial court gave a classic per se price-fixing instruction, and did not limit the instruction to horizontal price-fixing.[6] The rule of reason instruction given by the trial court[7] adequately covered the vertical territorial restrictions alleged by Petitioner.

---

[3] Petition at p. 5.

[4] Petition at p. 6.

[5] At pp. 4, 6, 7, 32, 34, and 38-38 of the Petition.

[6] This price-fixing instruction is quoted in n. 3 of the Ninth Circuit opinion in this case; see the last three paragraphs of the jury instructions quoted in n. 3 of the Ninth Circuit opinion, which certainly show that the price-fixing instruction given was a per se instruction, and was not limited to either horizontal or vertical price-fixing. This price-fixing instruction is found in the record at C. Tr. 1072-73, and R. Tr. 2356-57.

[7] Found in the record at C. Tr. 1058.

(2) Petitioner complains to this Court of the refusal to give a per se jury instruction involving alleged vertical price-fixing[8] and an alleged horizontal combination,[9] when (1) Petitioner at trial asked for only one per se jury instruction, Plaintiff's Proposed Instruction No. 5,[10] and (2) Petitioner now misleadingly omits major portions of that jury instruction and redrafts that jury instruction on p. 38 of its Petition, so as to change the jury instruction and present to this Court a different jury instruction from that presented to the District Court. The drastic "cut and paste" job done to that proposed instruction is shown at pp. 16-19 of this Brief.

(3) Every element of Plaintiff's Proposed Instruction No. 5, the only per se jury instruction sought at trial, was adequately covered by the trial court in its instructions. See pp. 13-15, *infra*.

(4) With respect to Petitioner's claim of error in the trial court's refusal to give that part of Plaintiff's Proposed Instruction No. 5 that is supposedly based upon *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), it is significant that at trial Petitioner (1) told the District Judge that it was not relying on a horizontal price-fixing theory,[11] and (2) then agreed with the District Judge that Petitioner did not request any jury instruction on a horizontal conspiracy to restrict territory.[12]

---

[8] Petition at pp. 6-8, 36-39, and 58.

[9] Petition at pp. 43-52.

[10] Found at C. Tr. 681 and quoted in full, without Petitioner's deletions, at pp. 13-15 of this Brief.

[11] C. Tr. 731 and 732, quoted at pp. 20-21, *infra*.

[12] This discussion with the trial Judge is found at R. Tr. 2377, quoted on p. 20, *infra*, and on p. 20 of the Brief of Appellees in the Ninth Circuit.

STATEMENT OF THE CASE

From the facts presented to this Court in Petitioner's brief it is difficult to understand how a jury, a federal district court judge and the Ninth Circuit Court of Appeals could come to a decision contrary to that urged by Petitioner.[13] The factual setting which Petitioner has presented to this Court is both inaccurate and incomplete. Petitioner's principal and president Mr. Stillwagon entered the business world and failed. Rather than examine his own actions in order to determine the reasons for his failure, he has sought throughout the six and one half year history of this case to shift any and all fault for his failure to The Mead Corporation.[14] The facts of this case neither support nor justify such a shift of responsibility.

Stillwagon is a former Mead employee whose employment was terminated in 1970. R.Tr. 1247. After receiving notice of his termination Stillwagon drafted and submitted a proposal (D-2) to Mead to become a merchant franchisee in Reno, Nevada. In this proposal Stillwagon unilaterally and without coercion or discussion with Mead proposed to limit sales efforts to parts of Nevada and California. Stillwagon asserted that his proposal was a novel approach to distribution in that he would sell directly from Mead's

---

[13] A jury verdict in favor of Respondents was affirmed by the Ninth Circuit Court of Appeals on February 21, 1979. When the jury returned its verdict in favor of all three Respondents in this action, the Court stated, R.Tr. 2388:

> "Well, ladies and gentlemen of the jury, you have been a very patient and hard working and perceptive jury, because I can say now at this time that *I concur in your verdict.*" (Emphasis added.)

[14] References to the record are as follows: Clerk's Transcript is C.Tr.; Reporter's Transcript is R.Tr.; Plaintiff's trial exhibit is P-000; Defendants' trial exhibit is D-000. Petitioner RenoWest Coast Distributing Company is abbreviated "RWC". Respondent the Mead Corporation is "Mead".

Western Regional Warehouse in Reno. He would thereby eliminate unnecessary distribution expenses such as those traditional costs incurred by independent distributors, *i.e.*, shipping, warehousing, capital expenditure for vehicles, inventory, and additionally, the risk of loss. Also to be eliminated were many of the traditional services provided to printer customers, thereby eliminating the necessity for personnel to provide those services. R.Tr. 410; D-2; R.Tr. 245-250; R.Tr. 421. He proposed a longer delivery time as a "trade-off' for the lower prices to the printers. See D-2. In fact, RWC maintained title to an average inventody during its 30 month life span of only $2,000 per month. D-102, D-103, D-104.

Mead provided support to Stillwagon in his investigation of the paper market in Nevada by financing a trip to California to meet with Mr. Pedersen, Mead's west coast representative, and Mr. Lindenbaum, President of Seaboard Paper Company, a merchant in San Francisco in which Mead held a 50% ownership.

During Stillwagon's meeting with Pedersen, Stillwagon alleged that a map of the west coast was reviewed to determine where he could sell. R.Tr. 235. The map at issue was, in fact, produced by RWC and contained the handwriting of Stillwagon alone, no one else. D-145; R.Tr. 237. Stillwagon's allegations with reference to the map were denied by Pedersen. R.Tr. 1022.

When Stillwagon returned from California he submitted a revised final proposal. The draft of that proposal states, in Stillwagon's own handwriting, that the only territorial problem which had previously existed, "Sacramento," had been resolved. D-112. The resolution of that problem was evident from the proposal itself which contained an attached list of cities where Stillwagon proposed to sell and listed, among others, Sacramento. D-145. See R.Tr. 1254.

Stillwagon's final proposal reiterated his intent to become a broker of Mead products and to capture sales through price cutting. Mead approved the proposal with only two qualifications: (1) RWC would have a credit limit of $10,-000 with a maximum limit of $20,000; and (2) RWC would provide Mead with monthly financial statements. D-5; R.Tr. 1443.

RWC was destined to fail from its inception. Two primary factors contributed to its ultimate failure: (1) RWC was severely undercapitalized; and (2) despite representations by Stillwagon to Mead that he would spend all of his time on the business affairs of RWC, he grossly neglected RWC by diverting substantial portions of his own time to the promotion of a new business venture.

The initial capitalization of RWC was $20,000. This sum was consumed within the first three months of RWC's existence by the salaries which Stillwagon paid to himself and his two employees. RWC's capital problems were compounded by the fact that the accounts which it was able to attract were extremely slow to pay, and Mead required Stillwagon to pay currently on paper sold out of the Mead warehouse inventory. See the testimony of Mr. Jones, Controller of Mead at R.Tr. 1464-1471; and D-18.

With its capital exhausted, numerous bad accounts outstanding, and an inability to attract new customers or to generate new sales, RWC was unable to cover its expenses. RWC sought additional credit from Mead. See D-107 and R.Tr. 486-487. Mead was unaware of RWC's severe financial problems, having been supplied with false and misleading financial statements. D-11; R.Tr. 1952. In reliance upon those financial statements Mead agreed to continue RWC's open account. RWC's problems continued to worsen. It continued to sell to slow paying accounts. It began to divert revenues to finance a computer

service corporation, Matrix, which had been originated by Stillwagon and the two former Mead employees who had aided him in the founding of RWC, Messrs. Haessler and Adkins. R.Tr. 1847, 1897-1898; D-26. RWC began to ignore the limitation which Mead had placed upon its open account by increasing that open account beyond the agreed $20,000 limit. See D-30.

As the open account of RWC continued to exceed the $20,000 limit, Mead became increasingly concerned about the likelihood of collecting that debt. Therefore, Mead requested and finally received an assignment of RWC's receivables. See D-20 and D-21. Mead then advised Stillwagon that it would sell to him on open account only for certain approved customers who had good credit histories. See D-24 and D-30. With these credit steps, RWC began to stablize. However, Stillwagon continued to neglect RWC. At this point Stillwagon was acting not only as RWC's chief executive officer, but also as its principal sales man and financial officer, aided only by a secretary, Ms. Crabtree. In June of 1972, Stillwagon abandoned RWC entirely and moved from RWC's headquarters in Reno to San Francisco where he devoted all of his time to the computer service business, Matrix. The operation of RWC was left in the hands of the secretary, Ms. Crabtree.

In December 1971, prior to Stillwagon's total abandonment of RWC a west coast paper distributor, Blake, Moffit and Towne, had sought to sell Mead products in the Reno area. Mead denied that request noting that Stillwagon needed more time to develop the Reno market. See third paragraph of second page of D-28; R.Tr. 1274. Several months after Stillwagon deserted RWC, Mead granted Blake, Moffit and Towne's request to sell certain Mead products in the Reno area. P-88.

Ignoring Mead's limitation of $20,000 on its open account, RWC gradually increased its indebtedness to Mead to $70,000. See D-95 In December of 1972, Mead discovered the facts that RWC (1) was paying expenses of Matrix Corporation, (2) was submitting to Mead false and misleading financial information, and (3) had achieved a negative net worth. Pursuant to the previously obtained assignment of receivables (D-25), Mead determined in February, 1973, to execute its rights. Mead wrote to RWC's customers demanding that they pay their obligations directly to Mead. D-46. Shortly thereafter, on February 15, 1973 RWC instituted this antitrust action.

Evidence presented at the trial of this action disclosed a much different picture of the financial condition of RWC than that which had been given to Mead through RWC's financial statements. Over the three year period of its existence RWC lost $13,979.83. R.Tr. 1846. With respect to payment to Mead, 46% of RWC's sales were sixty days late and 43% were over 120 days late. See D-95 and D-132. Although RWC attempted to factor its accounts, it was unable to do so. R.Tr. 1906. RWC overstated its income in the financial statements submitted to Mead by $23,409 for the year 1972. R.Tr. 1927. The financial statements submitted to Mead were inconsistent with RWC's federal income tax returns. See D-45 and D-98, D-99, D-100, and D-101.

RWC's one time financial officer, Adkins, testified in all seriousness that one may distort gross profits within the legal rules of accounting, R.Tr. 600:

> "This goes back to the purpose of presenting this data in this form. It is essentially to show that when you look at the financial statements of a corporation, it is a little bit like looking at a tight sweater. What you see is not always so."

Petitioner was unable to discredit the testimony of Respondents' two expert witnesses at trial. These were Mr. Gradsky, a C.P.A. who testified as to RWC's distorted financials, lack of financial stability and success, and speculative, unsupported damage assumptions and projections, R.Tr. 1842-1959; and Dr. Bucklin, head of the Ph.D. program in business at UCLA, a leading expert in marketing and the channels of distribution, who testified as to RWC's reliance upon Mead's Western Regional Warehouse which was closed by Mead in 1973 (R.Tr. 1677), as to the inability of RWC to achieve the projected sales upon which RWC's claimed damages were based, and as to the economic theory of distribution. Dr. Bucklin's direct testimony is R.Tr. 1658-1738. Mead's Western Regional Warehouse was closed in December, 1973, because of the superior economic feasibility of truck shipments direct to the west coast, and because of the low inventory turnover of the warehouse. See D-50 and the testimony of Mr. Foster, Mead's distribution manager, at R.Tr. 1594-1602. See also R.Tr. 998.

At trial RWC offered a damage exhibit (P-110) which purported to show a range of damages to RWC. The jury was not advised of any precise number of damages allegedly suffered but was invited by plaintiff to speculate that RWC had been damaged in amounts varying from $2,877,000 to $37,454,000. Such damages were computed by projecting a growth of sales and profits in Nevada (ignoring the actual performance of RWC which lost money over its period of operation) and then applying such projected growth to anticipated sales in California, Oregon, Utah, Arizona, Idaho and Washington. RWC never attempted sales in the latter four states. Such sales were projected for the period of the lifetime of George Stillwagon, who was assumed to retire at age 65. (Then, presumably because

of the inevitable economic fortunes of RWC, he would have become a multi-millionaire.) After this exhibit was thoroughly discussed both in direct and cross-examination of witnesses called by both parties, the court upon motion of the defendant properly excluded the document as speculative, R.Tr. 2109; 2182-2183.

The brief of Petitioner has noticeably omitted to state many of the essential facts in this case. The omitted facts are, interestingly, among those which support the verdict in this case. These facts include: (1) at no time did Mead refuse to sell to RWC from its own inventory when RWC paid in advance; (2) RWC never made any attempt to replace Mead with another supplier; (3) even after this lawsuit was initiated Mead permitted RWC to sell to customers whose credit was approved (see D-47); (4) not only did Mead not terminate RWC, but in fact RWC continued operation after the initiation of this lawsuit and was thereby able to reduce its debt to Mead from $70,000 to approximately $8,965.06 at the time of trial (see R.Tr. 1500 and D-95); (5) RWC was never limited to any sales territory by Mead and in fact sold freely and with Mead's knowledge and implicit approval in several areas of California (D-107, p. 2); (6) RWC never made any effort to attract sales in four of the six states (Oregon, Washington, Idaho and Arizona) in which its brief asserts it intended to sell, and upon which its damages exhibits and testimony relied; and (7) four of Mead's witnesses (Messrs. Ordeman, Herbert, Pedersen, and Lindenbaum (see R.Tr. 968-969; R.Tr. 1127-1128; R.Tr. 1254, 1267, 1273-1274, 1276)) denied that any territorial restriction was ever placed upon RWC.

ARGUMENT

A. ISSUES ONE AND TWO: THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE PLAINTIFF'S PROPOSED INSTRUCTION NO. 5 AS IT EMBODIED THE LAW SET FORTH IN GTE SYLVANIA AND IN UNITED STATES v. GENERAL MOTORS CORP.

1. The Trial Court Properly Refused Plaintiff's Proposed Instruction No. 5 As An Incorrect Statement Of The Law Under GTE Sylvania.

It is fundamental that in order to complain of error in refusing to give an instruction, the complaining party must offer a proposed instruction which correctly states the law.[15] Petitioner did not do so in this case. In addi-

---

[15] A requested instruction need not be given if it is "only partially correct and was not sufficiently discriminating" among the requesting parties' claims. *Palmer* v. *Hoffman*, 318 U.S. 109, 120 (1943). Such is the case here with Plaintiff's Proposed Instruction No. 5, which is only partially correct (in view of *GTE Sylvania*), and which does not discriminate among Petitioner's claims as to price-fixing and vertical restraints (in the last paragraph of the instruction). "Reviewing the charge as a whole under the traditional standard of review," *Pinkus* v. *United States*, 436 U.S. 293, 297 (1978), the Ninth Circuit correctly concludes that the District Court fully and fairly instructed the jury.

Most of the circuits have adopted the rule that in order for there to be error in refusing to give a requested jury instruction, the proffered instruction must be accurate in every respect. *Southern Ry. Co.* v. *Jones*, 228 F.2d 203, 213 (6th Cir. 1955); *Shaw* v. *Lauritzen*, 428 F.2d 247, 250 (3rd Cir. 1970); *United States* v. *Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). The trial court is not bound to give jury instructions in the form or language requested by the parties, so long as the substance of the requested charge is contained in the instructions given. *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1972) (antitrust action); *Coughlin* v. *Capitol Cement Co.*, 571 F.2d 290, 300 (5th Cir. 1978) (antitrust action); *Coursey* v. *Morgan Driveway, Inc.*, 366 F.2d 504, 508 (6th Cir. 1966); *United States* v. *McCarty*, 440 F.2d 681 (6th Cir. 1971); *Arkwright Mutual Insurance Co.* v. *Philadelphia Electric Co.*, 427 F.2d 1273, 1277 (3d Cir. 1970); *Chavis* v. *Finnlines Ltd.*, 576 F.2d 1072, 1076 (4th Cir. 1978); *Investment Service Co.* v. *Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir. 1975); *Jeter* v. *St. Regis Paper Co.*, 507 F.2d 973, 978 (5th Cir. 1975); *McGrath* v. *Wallace Murray Corp.*, 496 F.2d 299, 301 (10th Cir. 1974).

[16] Found in the record at C. Tr. 681.

[17] This instruction was given by the District Court at C. Tr. 1047 and R. Tr. 2340-2341.

tion, "jury instructions are to be judged as a whole, rather than by picking isolated phrases from them." *Hamling* v. *United States*, 418 U.S. 87, 108-109 (1974). The test is not whether the charge is faultless in every particular; the test is whether, considering the charge as a whole, the substance of the applicable law was fairly and correctly covered. *Marquis* v. *Chrysler Corp.*, 577 F.2d 624, 636 (9th Cir. 1978). An examination of the Proposed Instruction No. 5 shows that it was adequately covered in the District Court's instructions to the jury.

First, it is important that at trial Petitioner requested only one per se jury instruction, Plaintiff's Proposed Instruction No. 5[16] which Petitioner now has crudely rewritten for this Court's benefit. As submitted to the trial court, Plaintiff's Proposed Instruction No. 5 read in full as follows, with the footnotes showing how the trial court adequately covered each part of this requested instruction:

> "The antitrust laws are intended to foster and preserve our system of free, competitive enterprises, to preserve the fullest practicable competition in the market place, and to prevent the accomplishment of a monopoly in any business or industry.[17]
>
> There are certain agreements or practices, which,

because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively deemed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Territorial restrictions are [sic; probably meant 'and'] resale price fixing are in this category.[18]

A territorial restriction exists where a manufacturer sells its goods to a distributor and then restricts the area in which that distributor can re-sell those products. This, without more, is a violation of the antitrust laws. Such an agreement is illegal whether done only by the manufacturer or whether the manufacturer worked in concert with other distributors.[19]

Resale price fixing occurs when a seller requires the person to whom he has sold goods to re-sell them at a specific price.[20] Territorial restrictions occur when the seller of goods limits or restricts the area in which the person to whom he sold the merchandise can re-sell that merchandise. Customer restrictions occur when a manufacturer prohibits its distributor from re-selling products to certain customers.[21]

If you find such violations here, I instruct you that

---

[18] This paragraph was adequately covered by the instruction that a conspiracy to fix prices is in and of itself an unreasonable restraint of trade, and that whether the prices agreed to be fixed were reasonable or unreasonable is immaterial, but the conspiracy to fix prices is of itself an unreasonable restraint of trade. This instruction is quoted in the last two paragraphs of n. 3 of the Ninth Circuit's opinion; and is found in the record at C. Tr. 1072-73 and R. Tr. 2356-57.

[19] This is the *Schwinn* instruction which can no longer be given to a jury in the trial of a Sherman Act § 1 case after this Court's opinion in *GTE Sylvania*.

[20] This instruction was adequately covered by the District Court at C. Tr. 1074 and R. Tr. 2358. See note 16, *supra*.

[21] The District Court adequately covered these definitions as part of its rule of reason instruction concerning restricted territories, found in the record at C. Tr. 1058 and R. Tr. 2348.

the fact that the defendants or the co-conspirators may have had some business justification for their conduct would not constitute a defense. Nor is it a defense in such circumstances that the defendants may have believed that what they were doing is legal or good for business.[22]

Accordingly, should you find from the evidence in this case that the Mead Business & Commercial papers sold to plaintiff, to the other defendants or co-conspirators, or all of them, moved in the course of interstate commerce,[23] and should you further find that the defendant Mead, either alone or in concert with any of the other defendants or co-conspirators, restricted the area in which plaintiff could re-sell B & C papers, or the customers to whom plaintiff could re-sell B & C papers, or that resale prices were maintained, then the defendants would have violated the antitrust laws in the manner charged by the plaintiff,[24] and you must find for the plaintiff."[25]

---

[22] Petitioner does not complain of any error concerning the failure or refusal to give this paragraph of the instruction. In any event, the District Court adequately covered these principles when it instructed the jury (1) that a price-fixing conspiracy is in and of itself a reasonable restraint of trade; and (2) that the reasonableness or unreasonableness of the prices agreed to be fixed is immaterial, but that the conspiracy to fix prices in interstate commerce is of itself an unreasonable restraint of trade. These instructions are found in the last two paragraphs of n. 3 of the Ninth Circuit's opinion, and are found in the record at C. Tr. 1072-73 and R. Tr. 2356-57.

[23] There can be no error on the interstate commerce issue because the District Court resolved that issue in Petitioner's favor, and instructed the jury that interstate commerce had been established by the evidence, C. Tr. 1056 and R. Tr. 2347.

---

[24] At R. Tr. 2105, the District Judge held a conference with counsel out of the hearing of the jury, and discussed problems with the proposed jury instructions. The District Judge there told Petitioner that instructions like Plaintiff's Proposed Instruction No. 5 (which ends "and you must find for the plaintiff") "are, in effect, directed verdict instructions,

Surprisingly, this entire instruction just quoted has been entirely revised in the Petition for Certiorari; p. 38 of the Petition contains the following incorrect version of the last paragraph of the above-quoted Plaintiff's Proposed Instruction No. 5:

> "[S]hould you[26] find that the defendant Mead, *either alone* or in concert with any of the other defendants or co-conspirators . . . [maintained] resale prices . . . then the defendants would have violated the anti-trust laws in the manner charged by the plaintiff, and you must find for the plaintiff." (Emphasis and [maintained] added in Petition for Certiorari.)

Thus this abbreviated version presented in the Petition entirely eliminates the clauses "restricted the area in which plaintiff could re-sell B & C papers, or the customers to whom plaintiff could re-sell B & C papers, or that resale prices were maintained," and substitutes "[maintained] resale prices" for these clauses. The law is well settled that a party desiring a jury instruction must propose a correct one,[27] and under no stretch of the imagination can Petitioner's Proposed Instruction No. 5 be held to be correct.

---

saying if you find this, you must find for so and so," and stated his view of such instructions: if the instructions "say, well if you find this then you must find a verdict for the defendant or for the plaintiff, which I think are perfectly unacceptable." Yet Petitioner did not modify its Instruction No. 5, which this Court has termed "a so-called finding instruction which removed the jury's discretion," *Pinkus* v. *United States*, 436 U.S. 293, 303 (1978).

[25] The price-fixing instructions were given at C. Tr. 1072-73 and R. Tr. 2354-57. The territorial restraint and rule of reason instructions appear at C. Tr. 1057-1059 and R. Tr. 2347-2349.

[26] The Petition eliminates the word "further" that appears at this point in the instruction submitted to the District Court.

[27] See the cases in note 13, *supra*.

Second, Petitioner ignores the fact that the District Court charged the jury that price-fixing is a per se violation. The Court gave the following per se charge on price-fixing:

> "Reno-West Coast also claims that it was terminated as a fine paper's dealer in furtherance of a price-fixing conspiracy involving the defendants. In order to establish this claim plaintiff must show, by a preponderance of the evidence, (1) that Mead and these merchants actually agreed to fix fine paper prices in the west coast area, and (2) that Mead terminated Reno-West Coast as a fine paper's dealer in furterance [sic] of the conspiracy.
>
> A conspiracy to fix prices in or effecting interstate commerce, such as is alleged in the complaint, is in and of itself an unreasonable restraint of trade.
>
> Whether the prices agreed to be fixed were or are reasonable or unreasonable is immaterial, but the conspiracy to fix prices in interstate commerce is of itself an unreasonable restraint of trade." (C. Tr. 1072-73 and R. Tr. 2356-57.)

Petitioner's president Mr. Stillwagon testified that Petitioner adhered to its lower prices, and did not increase its prices in response to any communications or pressure from Respondent Mead Corporation:[28]

> "Q. Mr. Stillwagon, Mr. Herbert, you knew, was the president of Mead Paper Division, didn't you?
>
> A. That's correct.
>
> Q. And he never called you about your prices at any time, did he, sir?
>
> A. No. John did not.

---

[28] R. Tr. 546-547. See also R. Tr. 259 and 260 in which this same witness twice said that Petitioner did not increase its prices in response to communications from Respondents.

Q. And you didn't ask anybody at Mead about any conversations that you had about prices with Mr. Pedersen, did you?

A. That's correct.

Q. And you adhered to your lower prices, did you not?

A. Yes, I did."

Therefore the above-quoted jury instruction concerning price-fixing was more than sufficient to cover this aspect of the case. Petitioner's present complaint to this Court that the District Judge erred in refusing also to give Plaintiff's Proposed Instruction No. 5 is frivolous in view of the facts that (1) the District Court did give a per se price-fixing instruction; and (2) Petitioner's principal witness at trial testified that Petitioner did not increase its prices in response to any pressure concerning its pricing.

Third, it is not correct that the District Court erroneously "told the jury that the only way liability could be established was where there was proof of the *horizontal* price fixing agreement between all the defendants."[29] In fact, the above-quoted per se price-fixing instruction is not by its terms limited to a horizontal price-fixing agreement.

Fourth, Plaintiff's Proposed Instruction No. 5 was supported at trial by the per se rule of *Schwinn*.[30] At p. 41 of the Petition for Certiorari, Petitioner again calls Plaintiff's Proposed Instruction No. 5 its "combined *Schwinn/General Motors* instruction." In the United States Court of Appeals for the Ninth Circuit, Petitioner framed this first issue on appeal as an alleged error in refusing to give

[29] Petition for Certiorari at p. 38 (emphasis in Petition).

[30] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). See C. Tr. 683, the list of citations supporting Plaintiff's Proposed Instruction No. 5, which includes the *Schwinn* citation.

the *Schwinn* per se instruction.[31] Yet this Court in *GTE Sylvania* expressly overruled the *Schwinn* per se rule. See *GTE Sylvania*, 433 U.S. at 58, in which this Court stated "we conclude that the per se rule stated in Schwinn must be overruled." There is no sense in ordering a retrial of the instant action based upon the District Court's refusal to give a *Schwinn* per se instruction when such a retrial again would have to be under the rule of reason standards enunciated in *GTE Sylvania*.

2. The District Court Properly Refused Plaintiff's Proposed Instruction No. 5 Insofar As That Proposed Instruction Relied Upon United States v. General Motors Corp.

Petitioner now complains to this Court that its Instruction No. 5 was improperly rejected because Petitioner tried its case on a horizontal theory under *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966).[32] It is incorrect to state that Petitioner tried its case on a horizontal theory. Petitioner agreed with the Court in a discussion concerning jury instructions that Petitioner had not requested any jury instruction on a horizontal conspiracy to allocate territories:[33]

[31] At pp. 1-2 of its Appellant's Opening Brief in the Ninth Circuit, Petitioner framed the issue presented for review as whether the District Court erred in "refusing to instruct the jury that restrictions imposed by defendant-appellee The Mead Corporation" as set forth in Proposed Instruction No. 5 "constituted *per se* violations of Section 1 of the Sherman Act under the rule set forth in United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967)."

[32] Petition for Certiorari at pp. 42-43.

[33] This quotation is from R. Tr. 2377; it was quoted at p. 20 of the Brief of Appellees in the Ninth Circuit.

"THE COURT: I rewrote a couple of the defendants' instructions. I rewrote one of yours. I put one in on Schwinn. *There was no requested instruction on the horizontal conspiracy in territorial restraint; just on price.*
MR. SCARPULA: That's correct." (Emphasis added.)

Hence when the Court stated that the *United States* v. *General Motors Corp.* horizontal territorial conspiracy instruction had not been requested, Petitioner agreed. The price-fixing instruction was given by the Court, as noted previously in this Brief at p. 15 n. 22. Therefore to the extent that Petitioner complains of the District Court's refusal to give a requested horizontal instruction, Petitioner has no legitimate claim of error, since the District Court was told by Petitioner that it was not requesting an instruction on horizontal territorial restraints.

Not only did Petitioner agree with the trial court that it had not requested a horizontal territorial instruction, but it also told the trial court that its case was not based upon horizontal price-fixing. These statements are contained in the Plaintiff's Objections to the Defendants' Proposed Jury Instructions.[34] In objecting to various jury instructions proposed by defendants at trial, Petitioner stated in its written objections filed with the District Court that it neither alleged nor proved horizontal price-fixing:

"21. Plaintiff objects to Instruction No. 45 on the grounds that it mis-states the theory of plaintiff's case and was therefore prejudicial and erroneous because *plaintiff did not offer to prove that it was terminated in furtherance of any price fixing conspiracy.*

[34] These objections are Exhibit 5 to the Appellant's Opening Brief in the Ninth Circuit, and appear in the record at C. Tr. 731 and 732.

22. Plaintiff objects to Instruction No. 46 on the grounds that *no horizontal price fixing agreement involving defendant Mead was alleged in plaintiff's complaint nor any evidence offered of such an agreement* and therefore was prejudicial and erroneous.

23. Plaintiff objects to Instruction No. 47 on the grounds that *there was no allegation or evidence of a horizontal price fixing agreement involving the defendant Mead,* and therefore the instruction was confusing, prejudicial and erroneous. Plaintiff objects further to this instruction on the ground that it mis-states the law." (Emphasis added.)

Therefore Petitioner repeatedly told the trial court that it was not relying upon horizontal price-fixing, and as the above-quoted colloquy on the record with the court shows, Petitioner then told the District Court that it had not requested a per se horizontal territorial instruction. These quotations from the record were not simply discussions at preliminary pretrial conferences, or papers filed prior to trial. These were conversations with the District Judge during trial concerning the jury instructions, and a paper Petitioner filed at trial concerning the jury instructions, in which the Petitioner is informing the District Court what theories were not in the case. Yet Petitioner now complains of a failure to give one paragraph (the last paragraph of Plaintiff's Proposed Instruction No. 5), which it chooses to label a horizontal instruction. Again as this Court held in *Hamling* v. *United States,* 418 U.S. 87, 108-109 (1974), "jury instructions are to be judged as a whole, rather than by picking isolated phrases from them."

Even assuming that Petitioner can change its theories on appeal to this Court, the case of *United States* v. *General Motors Corp.,* 384 U.S. 127 (1966) is not applicable to the instant case, for several reasons. First, *General Motors*

did not involve territorial restrictions, but only price restrictions. 384 U.S. at 139-140. Second, *General Motors* involved purely horizontal restraints. The en banc opinion of the Ninth Circuit which was affirmed by this Court in *GTE Sylvania* recognized that *General Motors* "held the conduct of General Motors and its dealers unlawful *solely on the basis of a horizontal conspiracy among dealers* to prevent sales to discounters." *GTE Sylvania Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980, 993 (9th Cir 1976) (emphasis added). In addition, footnote 28 of this Court's opinion in *GTE Sylvania* cited *General Motors* for the proposition that "horizontal restrictions originating in agreements among retailers" remain illegal per se, 433 U.S. at 58 n. 28.[35]

Third, *General Motors* involved an unlawful refusal to deal: the *General Motors* dealers who were defendants had refused to deal with discounters, 384 U.S. at 135-138 and 145-146. In contrast, Respondent Mead Corporation in this action did not refuse to deal with Petitioner. R. Tr. 986, 1440-1500. Plaintiff's Objections to Defendants' Proposed Jury Instructions stated that at trial "plaintiff did not offer to prove that it was terminated in furtherance of any price fixing conspiracy."[36]

In summary, Petitioner is attempting on appeal to fit its case within *General Motors*, since its reliance at trial

---

[35] See also the definition of a horizontal restraint in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972).

[36] This is objection 21 of Plaintiff's Objections to Defendants' Proposed Jury Instructions, found in the record at C. Tr. 731. Indeed, Petitioner's various complaints in this action use the term "vertical conspiracy" repeatedly. See ¶ 16 of the original complaint in this action, R. Tr. 5; ¶ 18 of the amended complaint in this action, R. Tr. 104; and ¶ 18 of the supplemental and amended complaint in this action, R. Tr. 405.

upon the per se rule of *Schwinn* has been completely undercut by *GTE Sylvania*. This action was not tried as a horizontal conspiracy case, and Petitioner repeatedly represented to the District Court, and agreed with the District Court, that Petitioner was not pursuing a horizontal conspiracy theory, either as to territorial or as to price restraints.

B. ISSUE THREE: THE NINTH CIRCUIT DID NOT ERR IN HOLDING THAT THE DISTRICT COURT PROPERLY TRIED THIS ACTION UNDER THE EN BANC NINTH CIRCUIT OPINION IN GTE SYLVANIA, WHICH EN BANC OPINION WAS DELIVERED OVER FIVE MONTHS BEFORE THE TRIAL OF THIS ACTION IN SEPTEMBER-OCTOBER, 1976.

This issue was not presented to the Ninth Circuit. Petitioner now argues[37] that to hold that Plaintiff's Proposed Instruction No. 5 was properly rejected penalizes Petitioner for failing to anticipate this Court's reversal of the *Schwinn* per se rule, in *GTE Sylvania*. Such an argument is fallacious for three reasons.

First, the relevant dates show that Petitioner's argument must fail. *Schwinn* was decided in 1967, and much criticised in subsequent years. See the cases and authorities collected in *GTE Sylvania*, 433 U.S. at 48 nn. 13 and 14. The *GTE Sylvania* opinion stated that: "The great weight of scholarly opinion has been critical of the decision, and

---

[37] Question 3 of the Questions Presented at pp. 4-5 of the Petition for Certiorari.

a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach." 433 U.S. at 48 (footnotes omitted). On April 9, 1976, the Ninth Circuit delivered its en banc opinion in *GTE Sylvania, Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976). The instant action was tried in September and October 1976, *over five months after* the Ninth Circuit's *GTE Sylvania* opinion, when that opinion was the most recent Ninth Circuit opinion (and the only en banc opinion) on the continuing validity and application of the *Schwinn* per se rule. Hence this Court's subsequent affirmance of the Ninth Circuit en banc opinion could hardly have shocked Petitioner or denied Petitioner's alleged due process rights[38] by requiring Petitioner to "have anticipated, or second-guessed, this Court's *GTE-Sylvania* decision," Petition for Certiorari at p. 67.

Second, it is fundamental that an appellate court applies the law in effect at the time it renders its decision, *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 711 (1974); *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969). Therefore the Ninth Circuit properly applied this Court's *GTE Sylvania* analysis to this case, because this Court's *GTE Sylvania* opinion was the law in effect at the time of the decision by the Ninth Circuit. Indeed, at least four Circuit Courts of Appeals have resolved questions quite similar to that presented in the instant case: should the results in cases tried when *Schwinn* was the law be changed on appeal, when the appellate courts are dealing with those cases at a time when the *Schwinn* per se rule was overruled by this Court in *GTE Sylvania*?

The First Circuit in *Eastern Scientific Co.* v. *Wild Heer-*

[38] As Petitioner argues at pp. 62-65 of the Petition for Certiorari.

brugg Instruments, Inc., 572 F.2d 883 (1st Cir. 1978) held that where the district court had instructed the jury that a distributor's conduct amounted to a per se violation of the Sherman Act, and where the Supreme Court decision in *GTE Sylvania* overruled the per se rule of *Schwinn* after the district court's instruction, a new trial was warranted in a case in which the jury had found in favor of the plaintiff. "GTE Sylvania overruled this per se rule and instructed courts to apply a rule of reason standard in evaluating territorial restrictions." 572 F.2d at 884. In the instant case Judge Spencer Williams did give a rule of reason instruction.

The Second Circuit in *National Auto Brokers Corp.* v. *General Motors Corp.*, 572 F.2d 953 (2d Cir. 1978) also dealt with a situation in which the plaintiff-appellant "relied below" upon the per se rule in *Schwinn*, 572 F.2d at 960. The court held:

> "Although *Continental T.V., Inc., supra,* was not decided by the Supreme Court until after the conclusion of trial of the present case, we are bound to apply its principles rather than the earlier *per se* rule of *Schwinn*. See *Cort* v. *Ash* 422 U.S. 66, 74-77." 572 F.2d at 960 (emphasis in original).

The Fifth Circuit in *Florida Harvestore, Inc.* v. *A. O. Smith Harvestore Products, Inc.*, 1977-2 CCH Trade Cases ¶ 61,679 (5th Cir. 1977) vacated and remanded a $105,000 damage award obtained by a plaintiff on a territorial restrictions claim that was tried before this Court's opinion in *GTE Sylvania*.

The Seventh Circuit in *General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147 (7th Cir. 1978) reversed and remanded for a new trial a case in which a plaintiff obtained a judgment of $1,307,401.75, when this Court's

GTE Sylvania opinion had been handed down about eight months after the conclusion of the jury trial in that action. 568 F.2d at 1151. The court there had given a *Schwinn* per se instruction such as that requested by Petitioner in this case. 568 F.2d at 1152. The court first held: "We are of course required to decide this case on the basis of existing law rather than according to the law that existed at the time of the decision below." 568 F.2d at 1151-52.

The Seventh Circuit then held that in view of this Court's *GTE Sylvania* opinion, the district court's *Schwinn* per se instruction was reversible error which could not be considered harmless, and that the defendants' failure to object to the per se instruction (in the instant case Respondents did object to the per se instruction, Plaintiff's Proposed Instruction No. 5, and it was not given) did not preclude consideration of the propriety of the instruction on appeal. 568 F.2d at 1152, 1154.

Finally, the Tenth Circuit in *Adolph Coors Co.* v. *A & S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977) held that this Court's *GTE Sylvania* opinion must be applied by the Tenth Circuit in reviewing a district court decision reached when *Schwinn* was the law, 571 F.2d at 809-810. In that case, as in the instant case, the appellant contended "that the trial court erred in failing to instruct the jury that Coors' efforts at firm and resolute enforcement of territorial restrictions on the resale of its products constituted a *per se* violation of Section 1 of the Sherman Act." 561 F.2d at 812 (emphasis in original). However the Tenth Circuit rejected that contention, holding that this Court's *GTE Sylvania* opinion "disposes of this issue adversely to" the party who wanted the *Schwinn* instruction. 561 F.2d at 812.

In summary, the cases reported after this Court's *GTE Sylvania* opinion show that the District Court in this action

correctly refused to give Plaintiff's Proposed Instruction No. 5.

Third, Petitioner incredibly suggests at p. 67 of the Petition that "the District Court did not allow Petitioner – or Respondents for that matter – to review those instructions prior to giving them to the jury." This statement is inaccurate. The following excerpt from the record (R. Tr. 2376)

> "THE COURT: One further request of counsel. Do either of you have instructions that you would wish to give at this time that we have not given?
>
> MR. GILLIAM: No, Your Honor.
>
> MR. SCARPULLA: No, Your Honor.
>
> THE COURT: Fine."

Thus both sides had the opportunity Petitioner now denies, and the record nowhere contains an objection by Petitioner to any action of the District Court in refusing to let the parties see the jury instructions. Both parties in fact worked with both the District Judge and his law clerk on the jury instructions.

C. ISSUE FOUR: THE DISTRICT COURT DID NOT ERR IN REFUSING TO ALLOW PETITIONER'S PRESIDENT TO TESTIFY AS AN EXPERT, WHEN THE DISTRICT COURT DID PERMIT (1) PETITIONER'S PRESIDENT TO TESTIFY AS A LAYMAN BOTH AS TO THE THEORY AND NUMBERS INVOLVED IN THE ALLEGED DAMAGES, AND (2) A Ph.D. FROM THE UNIVERSITY OF MICHIGAN TO TESTIFY AS AN EXPERT CONCERNING BOTH THE THEORY AND NUMBERS INVOLVED IN THE ALLEGED DAMAGES.

It is important to clarify the issue before this Court under this question presented: the issue is only whether the District Court erred (*i.e.*, whether it abused its discretion) in refusing to let Petitioner's president Mr. Stillwagon wear the mantle of an expert. The issue is not whether the District Court erroneously refused to let Mr. Stillwagon testify at all concerning his damage theory or the numbers involved in it. The statement at p. 69 of the Petition for Certiorari that "the District Court prevented Stillwagon from testifying as to how Petitioner's damage theory was developed or what factors were considered to arrive at the amount of damages" is false.

First, Mr. Stillwagon was permitted by the District Court to testify as a layman on both the damage theory and on the numbers involved in the theory. Specifically, Mr. Stillwagon testified as to the theory followed in making the damage study.[39] The trial court simply ruled that Mr.

---

[39] At R. Tr. 351, Petitioner's president testified fully on the theory involved in making the damages:

> "MR. SCARPULLA: Q. Now, Mr. Stillwagon, before we get into a more detailed analysis of the damage study, would you please tell the Court and the jury what the philosophy was behind projecting these damages into other areas?
>
> A. The philosophy was that we would calculate what share of the market we had been able to attain in Nevada, and then project, based on that share, into the other states where we were not allowed to compete.
>
> We also made estimates of the growth rate and sales of every one of the states that we were talking about and the growth rate in Nevada.
>
> Essentially, we were making an estimate of what our share of the market was and then using that to project other shares of markets that we could have attained if we would have been allowed to go where we were not allowed to go.
>
> Q. Was that information then programmed into a computer, the various shares that were projected?
>
> A. The various shares, along with growth rates by state and estimates of contribution and estimates of our fixed expenses in selling in most of those states."

Stillwagon could not testify *as an expert,* R. Tr. 378, 444, 363, and 2074. Mr. Stillwagon was permitted to testify to the percent of the market Petitioner supposedly obtained in Nevada, the percent of the market Petitioner would have obtained in other states, the gross receipts from such sales, the profits from such sales, and so on. R. Tr. 499 *et seq.*

Second, the ruling that Mr. Stillwagon could not testify as an expert was totally within the trial court's discretion. *Salem* v. *United States Lines Co.,* 370 U.S. 31, 35 (1962):

> "Furthermore, the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous."

This principle was reaffirmed in *Hamling* v. *United States,* 418 U.S. 87, 108 (1974), which stated that "the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the

case of expert testimony." *Accord*: *Marquis* v. *Chrysler Corp.*, 577 F.2d 624, 636-637 (9th Cir. 1978).[40]

Fourth, Petitioner's expert Dr. Haessler from the University of Michigan testified in full as to both the theory and numbers involved in Petitioner's alleged damages. The District Judge accepted Dr. Haessler as an expert, R. Tr. 708, and Petitioner then proceeded to elicit a number of expert opinions as to the method of computing future damages, R. Tr. 713, 715-16, 718, 719, 722, 729-30, and 731. Dr. Haessler testified in full that "the method was completely proper,"[41] and that he had reviewed all of the figures involved in the damages exhibits. R. Tr. 718, 722, 729-31. Hence there can be no error in limiting Mr. Stillwagon to testifying as a layman, in view of the fact that Petitioner had the benefit of a qualified expert at trial.

Finally, Petitioner's claim before this Court that it did not have the benefit of Mr. Stillwagon's testimony as to the theory of damages is belied by Petitioner's closing argument to the jury, R. Tr. 2252-53, in which the jury was reminded that Mr. Stillwagon did indeed testify fully as to the damage theory:

---

[40] In the Petition for Certiorari at pp. 68-69, 70 and 74-75, Petitioner places great reliance upon *Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). However, *Sunkist* only held that properly qualified experts can testify using projections. In that case two experts testified, 526 F.2d at 1206, and the court found that "Plaintiffs' expert witnesses who testified at the trial on damages were properly qualified," 526 F.2d at 1207. Respondents here have no quarrel with the *Sunkist* opinion; in the instant case Mr. Stillwagon was simply not properly qualified, and the Court so found. See R. Tr. 369-70, in which the District Judge in this action dealt with the *Sunkist* case and stated that the question before him was not whether projections could be used, but rather whether *this witness* (Mr. Stillwagon) could make such projections *as an expert*.

[41] R. Tr. 731.

> "We have heard testimony by Mr. Stillwagon that as the president of Reno-West Coast he has suffered injury, and the injury that he has suffered has been due only, he testified to that, only to the acts of the defendants.
>
> That was the testimony. Now, I have done a computation of the damages which were testified to by Mr. Stillwagon.
>
> *He told you how he did it. He said, I knew what my share of the Nevada market was. Now, based on my experience as a business man and president* of Reno-West Coast, *I think I could get a share of the California market,* the market from which I was excluded. And I think I could get a share of the Oregon market, the market from which I was excluded. And I think I could get a share of the Washington market, the market from which I was excluded. And I think I could get a share of the Idaho market, the market from which I was excluded. I think I could get a share of the Arizona and Utah and other markets from which I was excluded." (Emphasis added.)

Therefore, Petitioner's claim of error by the exclusion of testimony as to the theory of damages is frivolous.

CONCLUSION

For the foregoing reasons, Mead respectfully requests that this Court deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

Armistead W. Gilliam, Jr.
Charles J. Faruki
SMITH & SCHNACKE
10 West Second Street
P. O. Box 1817
Dayton, Ohio 45401
(513) 226-6734

Attorneys for Respondents
The Mead Corporation, Nolex, Inc.,
Noland Paper Company and Seaboard
Paper Company

Of Counsel:

Robert L. Maines
Charles B. Klinedinst
PETTIT, EVERS & MARTIN
600 Montgomery Street
Transamerica Building
21st floor
San Francisco, California 94111
(415) 434-4000